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SOME REFLECTIONS ON INDEPENDENCE, IRREMOVABILITY AND SEPARATION OF THE BRANCHES OF STATE POWERS, IN THE LIGHT OF THE RECENT UKRAINIAN JUDICIAL REFORM

1. *Introduction. The principle of irremovability of judges and its links with the independence of the judiciary and the principle of separation of the branches of State powers*

The principle of irremovability of judges represents an undefeatable corollary of their independence[1]

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[1] See ECtHR [GC] 18 July 2013, nos. 2312/08 and 34179/08, *Maktouf and Damjanovic v. Bosnia and Herzegovina*, § 49: «The irremovability of judges by the executive during their term of office is in general considered as a corollary of their independence and thus included in the guarantees of Article 6 § 1»; in the same sense, *ex plurimis*: ECtHR 10 January 2012, no. 33530/06, *Poshka v. Poland*, § 34; ECtHR 21 June 2011, no. 8014/07, *Fruni v. Slovakia*, § 145; ECtHR 30 November 2010, no. 23614/08, *Henrik Urban and Ryszard Urban v. Poland*, § 45; ECtHR 9 November 2006, no. 65411/01, *Sacilor Lormines v. France*, § 67; ECtHR 16 December 2003, no. 48843/99, *Cooper v. The United Kingdom*, § 118; ECtHR 26 February 2002, no. 38784/97, *Morris v. The United Kingdom*, § 68; ECtHR 28 June 1984, nos. 7819/77 and 7878/77, *Campbell and Fell v. The United Kingdom*, § 80.

and of the principle of separation of the branches of State powers[2].

[2] See ECtHR [GC] 23 June 2016, no. 20261/12, *Baka v. Hungary*, § 172: «[…] although the applicant remained in office as judge and president of a civil division of the new Kúria, he was removed from the office of President of the Supreme Court three and a half years before the end of the fixed term applicable under the legislation in force at the time of his election. This can hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the irremovability of judges, which – according to the Court's case-law and international and Council of Europe instruments – is a key element for the maintenance of judicial independence». Among the «international and CoE instruments» cited above and widely transposed in *Baka*, see: *The Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan in 1985, endorsed by UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, in https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx: «12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists»; the United Nations Human Rights Committee's *General Comment no. 32 on Article 14 of the International Covenant on Civil and Political Rights (Right to equality before courts and tribunals and to a fair trial)* published on 23 August 2007: «19. […] The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature […]»; the Recommendation CM Rec (2010)12 of the Committee of Ministers of the Council of Europe to member states on *Judges: independence, efficiency and responsibilities*, adopted on 17 November 2010: «Tenure and irremovability. 49. Security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists»; Opinion no. 1 (2001) of the Consultative Council of European Judges (CCJE) on *Standards concerning the independence of the judiciary and the irremovability of judges*, adopted on 23 November 2001: «Tenure - irremovability and discipline. 57. It is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office […] 60. The CCJE considered (a) that the irremovability of judges should be an express element of the independence enshrined at the highest internal level […]»; *The Magna Carta of Judges (Fundamental Principles)*, adopted by the CCJE in November 2010: «4. Judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary»; the Inter-American Court of Human Rights, in its case-law concerning the removal of judges, namely in the case of the Supreme Court of Justice (*Quintana Coello et al. v. Ecuador*, judgment of 23 August 2013, in http://www.worldcourts.com/iacthr/eng/decisions/2013.08.23_Quintana_Coello_v_Ecuador.pdf, concerning the removal of 27 judges of the Supreme Court of Justice of Ecuador through a parliamentary resolution, noted as follows as regards the general standards on judicial independence: «The Court considers it pertinent to specify that the violation of the guarantee of judicial independence, as it relates to a judge's tenure and stability in his position, must be examined in light of the conventional rights of a judge who is affected by a State decision that arbitrarily affects the term of his appointment. In that sense, the institutional guarantee of judicial independence is directly related to a judge's right to remain in his post, as a consequence of the guarantee of tenure in office. 154. Finally, the Court has emphasized that the State must guarantee the independent exercise of the judiciary, both in its institutional aspect, that is, in terms of the judicial branch as a system, and in its individual aspect, that is, in relation to a particular individual judge. The Court deems it pertinent to point out that the objective dimension is related to essential aspects for the Rule of Law, such as the principle of separation of powers, and the important role played by the judiciary in a democracy. Consequently, this objective dimension transcends the figure of the judge and collectively affects society as a whole. Likewise, there is a direct connection between the objective dimension of judicial independence and the right of judges to have access to and remain in public service, under general conditions of equality, as an expression of their guaranteed tenure».

This principle of paramount importance, far from symbolizing an undue privilege for judges, actually represents the guarantee of people from not risking to be trialed by a judge who, because of the fear of being removed (or of the hope of being promoted) as a result of its decision-making activity[3], may be tempted to adjudicate the case in accordance with its interests, rather than with the law in force.

Hence, the relevance of such principle in the perspective of the right to a fair trial under Art. 6 § 1 of the Convention[4].

Besides, that is the reason why the scope of the principle of irremovability protects the single judge not only from any interference of other branches of State powers, but also from pressures within the judiciary, notably from its self-governing bodies.

In this sense, the principle of irremovability therefore involves the principle of independence[5] of the judiciary in its maximum extension, both "external" (connected with the principle of separation of the branches of State powers) and "internal" (linked with hierarchical relations among judges)[6].

Of course, irremovability does not mean absolute impossibility to remove a judge.

Rather, it means that it is impossible for a judge to be removed because of its legitimate decision-making activity already performed or because of the one currently underway. In this perspective, the principle at stake also represents the counterpart of the "principle of the natural judge established by law", in turn placed as a guarantee of people against the distortions

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[3] *Sine spe, nec metu* is *a condicio sine qua non* of independence and impartiality of the judiciary.

[4] See ECtHR [GC] *Maktouf and Damjanovic v. Bosnia and Herzegovina*, cited above, § 49.

[5] For a brief literature review, see, among others: M. SWART, *Independence of the Judiciary*, in *Oxford Constitutional Law*, Oxford, Max Planck Foundation for International Peace and the Rule of Law, March 2019; S. B. BURBANK, *Judicial Independence, Judicial Accountability and Interbranch Relations*, in *Georgetown Law Journal*, 2006, p. 909 ss.; J. RÍOS-FIGUEROA, J. K. STATON, *An Evaluation of Cross-National Measures of Judicial Independence*, in *The Journal of Law, Economics, and Organization*, 2012, p. 104 ss.; G. TRIDIMAS, *Independent Judiciary*, in *Springer Encyclopedia of Law and Economics*, January 2014; M. SHAPIRO, *The success of judicial review and democracy*, in M. SHAPIRO, A. STONE SWEET (eds.) *On law, politics and* judicialization, Oxford, 2002, p. 149 ss.; L. B. TIEDE, *Judicial independence: Often cited, rarely understood*, in *Journal of Contemporary Legal Issues*, 2006, p. 129 ss.; D. KOSAŘ, *Policing Separation of Powers: A New Role for the European Court of Human Rights?*, in *Eur. Const. Law Rev.*, 2012, p. 33 ss.; *Ibidem*, *Perils of Judicial Self-Government in Transitional Societies*, Cambridge, 2017, with further references; A. NUßBERGER, *Judicial Reforms in Post-Soviet Countries – Good Intentions with Flawed Results?*, in A. SEIBERT-FOHR (eds.), *Judicial Independence in Transition*, Heidelberg, 2012, p. 885 ss.; A. SEIBERT-FOHR, *Judicial Independence in European Union Accessions: The Emergence of a European Basic Principle*, in *Germ. YB Int. Law*, 2009, p. 423 ss.; S.B. BURBANK, B. FRIEDMAN, D. GOLDBERG, *Introduction*, in S.B. BURBANK AND B. FRIEDMAN (eds.), *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, Sage Publications, 2002 p. 30 ss.; C. GUARNIERI, *Judicial Independence in Europe: Threat or Resource for Democracy*, 49(3) Representation, 2013, p. 347 ss.; M. POPOVA, *Politicized Justice in Emerging Democracies. A Study of Courts in Russia and Ukraine*, Cambridge, 2012, p. 134 ss.; P. H. RUSSEL, *Towards a General Theory of Judicial Independence*, in P. H. RUSSEL AND D. M. O'BRIEN, *Judicial Independence in the Age of Democracy. Critical Perspectives from Around the World*, University Press of Virginia, 2001; D. KOSAŘ and L. LIXINSKI, *Domestic Judicial Design by International Human Rights Courts*, in *Am. Jour. Int. Law*, 2015, p. 714 ss.; A. GARAPON, *A New Approach for Promoting Judicial Independence*, in R. PEERENBOOM, ed, *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, 2009, New York and Cambridge; G. VANBERG, *Establishing and Maintaining Judicial Independence*, in G. CALDEIRA, R. KELEMEN, K. WHITTINGTON, (eds.), *The Oxford Handbook of Law and Politics*, 2008, Oxford, p. 99 ss.

[6] See, among others, G. NEPPI-MODONA, *The various aspects of external and internal independence of the judiciary*, in *Seminar on the independence of justice*, Tunis (Tunisia), 21-22 March 2012; J. SILLEN, *The concept of 'internal judicial independence' in the case law of the European Court of Human Rights*, in *Eur. Const. Law Rev.*, 2019, p. 104 ss.

of "extra-ordinem"[7] or "special"[8] judges (meaning that the judge who rules a case must be identified on the basis of objective criteria predetermined by law, and not on the basis of arbitrary choices of any individual, internal or external to the judiciary).

Accordingly, the provision of judge's removals as a consequence of conducts constituting a criminal or disciplinary offence[9], as well as of objective reasons of incapacity[10], incompatibility or reorganization of judicial offices[11], remains fully legitimate.

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[7] *Id est post-factum* established tribunals.

[8] *Id est* categories of judges, not belonging to the ordinary *corpus* of the judiciary, designated to adjudicate specific matters.

[9] See, *inter alia*, the *European Charter on the Statute for Judges* of 8-10 July 1998: «5.1. The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority [...] 7.1. A judge permanently ceases to exercise office through resignation, medical certification of physical unfitness, reaching the age limit, the expiry of a fixed legal term, or dismissal pronounced within the framework of a procedure such as envisaged at paragraph 5.1 hereof»; the Recommendation CM Rec (2010)12 of the Committee of Ministers of the Council of Europe to member states on *Judges: independence, efficiency and responsibilities*, cited above: «50. The terms of office of judges should be established by law. A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. Early retirement should be possible only at the request of the judge concerned or on medical grounds»; see also the *Universal Charter of the Judge*, approved by the International Association of Judges on 17 November 1999: «Article 8. Security of office. A judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure. A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered»; the United Nations Human Rights Committee's General Comment no. 32 *on Article 14 of the International Covenant on Civil and Political Rights (Right to equality before courts and tribunals and to a fair trial)*, cited above: «20. Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary. The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law».

[10] See *The Basic Principles on the Independence of the Judiciary*, cited above: «18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties».

[11] See Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe, cited above: «A judge should not receive a new appointment or be moved do another judicial office without consenting to it" with the exceptions of disciplinary sanctions or a "reform of the organization of the judicial system"». See also: Opinion no. 1 (2001) of the Consultative Council of European Judges (CCJE) on *standards concerning the independence of the judiciary and the irremovability of judges*, cited above: «The European Charter [on the Statute for Judges] affirms that this principle extends to appointment or assignment to a different office or location without consent (other than in case of court re-organisation or temporarily), but both it and Recommendation No. R (94) 12 contemplate that transfer to other duties may be ordered by way of disciplinary sanction […] 59. The existence of exceptions to irremovability, particularly those deriving from disciplinary sanctions, leads immediately to consideration of the body and method by which, and basis upon which, judges may be disciplined. Recommendation No. R (94) 12, Principle VI(2) and (3), insists on the need for precise definition of offences for which a judge may be removed from office and for disciplinary procedures complying with the due process requirements of the Convention on

Nevertheless, when the removal of a judge is the result of disciplinary proceedings[12] or of the evaluation of its professional skills[13], the principle of separation of powers[14] is crucial, since any abuse of disciplinary measures or vetting procedures can irreparably undermine the independence of the judiciary.

2. *The new "matryoshka" architecture of the judiciary's self-government system shaped by the Ukrainian Reform*

Recently, the Ukrainian Parliament (*Vidomosti* of the *Verkhovna Rada* of Ukraine) enacted the Law no. 193-IX *on amendments to certain Laws of Ukraine regarding activities of the bodies of judicial governance* (entered into force on 7 November 2019), which was adopted by the *Rada* on 16

Human Rights. Beyond that it says only that "States should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself […] 60. The CCJE considered […] (c) that it would be useful to prepare standards defining not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps or change of status, including for example a move to a different court or area»; the International Bar Association's *Minimum Standards of Judicial Independence* (1982): «20. […] (b) In case of legislation reorganising courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same status».

[12] These are the key findings of the cases ECtHR 9 January 2013, no. 21722/11, *Volkov v. Ukraine*, and ECtHR 19 January 2017, no. 5114/09 and 17 others, *Kulykov and others v. Ukraine.*

[13] This is the core of the case ECtHR [GC] 25 September 2018, no. 76639/11, *Denisov v. Ukraine.*

[14] See ECtHR *Volkov v. Ukraine*, cited above, §§ 103, 118 and 199: «103. […] The Court emphasises that the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in its case-law […] 118. The subsequent determination of the case by Parliament, the legislative body, did not remove the structural defects of a lack of "independence and impartiality" but rather only served to contribute to the politicisation of the procedure and to aggravate the inconsistency of the procedure with the principle of the separation of powers […] 199. The Court notes that the present case discloses serious systemic problems as regards the functioning of the Ukrainian judiciary. In particular, the violations found in the case suggest that the system of judicial discipline in Ukraine has not been organised in a proper way, as it does not ensure sufficient separation of the judiciary from other branches of State power. Moreover, it does not provide appropriate guarantees against abuse and misuse of disciplinary measures to the detriment of judicial independence, the latter being one of the most important values underpinning the effective functioning of democracies».

The above-cited case *Kulykov and others v. Ukraine* can be considered, for its features, as a "twin" of *Volkov*: see §§ 135 and 138: «135. With regard to the complaints under Article 6 § 1 of the Convention that the domestic bodies dealing with the applicants' cases lacked independence and impartiality, the Court refers to its findings in Oleksandr Volkov […] The Court considers that those findings are equally relevant to the present applications […] 138. The Court has to determine whether the applicants' dismissals violated their right to respect for private life. In Oleksandr Volkov (cited above, §§ 166-67 and 173-85) the Court found that the applicant's dismissal from the post of judge had constituted an interference with his private life and that such interference did not comply with the requirements of "quality of law" and was not therefore lawful for the purpose of Article 8 of the Convention. Those findings are relevant to the present applications and there is no reason to depart from them».

As regards the grounds for the violation of Art. 6 § 1, the same goes for the case *Denisov v. Ukraine*, cited above, §§ 68-82.

October 2019 as Draft Law no. 1008, aimed at amending several key points of the Law *On the Judiciary and the Status of Judges* of 2016 and of the Law *On the High Council of Justice* of 2017[15].

The said Law introduces foremost changes in four principal fields of the Ukrainian judiciary, with particular regard to structure and role of the «High Council of Justice» (hereinafter HCJ), composition and status of the «High Qualification Commission of Judges» (hereinafter HQCJ), numeric composition of the Supreme Court and disciplinary proceedings.

As an external observer, it is possible to perceive that the new self-government system - although so intricate in its structure to the point of recalling a "matryoshka"[16] - appears to be roughly in line with the standards of the Council of Europe (hereafter "CoE"), of the European Court of Human Rights, of the Consultative Council of European Judges, of the Venice Commission[17] and of the Principles of Judicial Conduct of Bangalore, even though some clarifications are still necessary on several crucial points.

In fact, it should be firstly noted that all the bodies of the new structure resulting from the implemented Reform seem to respect the rule of «no less than half of judges elected by their peers»[18].

Nevertheless, some corrective measures seem indispensable, in order to eradicate any possibility of circumvention.

More in detail, the High Council of Justice (HCJ) is composed of 21 members, 10 of whom are judges chosen by their peers, and 10 are selected by other bodies (President, Parliament, Lawyers, Prosecutors, Academics, 2 for each of them), plus the First Chairmen of the Supreme Court, who is a *de iure* member of it.

Within the HCJ, therefore, the «no less than half» rule required by the CoE is fully respected; rather, even the «substantial majority» of judges elected by their peers – recommended by the Consultative Council of European Judges (hereinafter "CCJE") in case of «mixed composition» (judges and non judges) of the Council for the judiciary – is guaranteed.

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[15] For the full text of the Reform, contained in the Law No. 193 of Ukraine *On amending certain laws of Ukraine regarding activity of judicial governance bodies* and the *explanatory note*, see the unofficial translation carried out by the European Commission for Democracy through Law (Venice Commission).

[16] The complex system of "concentric boxes" (High Council of Justice, Integrity and Ethics Board, Selection Board, High Qualification Commission of the Ukrainian Judiciary) conceived by the Ukrainian Legislator does not seem to have specific precedents in the structure of the Councils for the Judiciary of other Council of Europe's Members States. At this stage, that makes difficult to predict in detail the possible inter-relational dynamics between all the institutional bodies shaped by the reform. Thus, an attempt will be made here in the light of the dynamics that, in practice, have been verified in other Countries in similar situations.

[17] See the *Opinion on amendments to the legal framework governing the Supreme Court and judicial governance bodies* adopted by the Venice Commission at the 121st Plenary Session (Venice, 6-7 December 2019), § 22.

[18] The CoE standards require that not less than half the members of the Councils for the Judiciary (which are to be established by law or under the constitution) should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary: see Appendix to Recommendation CM/REC/(2010)12, cited above, chapter IV, par. 27; chapter VI, par. 46; see also its Explanatory Memorandum, chapter IV, par. 36; chapter VI, par. 51. In the same sense, see the Venice Commission *Report on the independence of the judicial system*, part I, §§ 32 and 82.4. In a more precautionary way, see the Opinion no. 10 (2007) of the Consultative Council of European Judges (CCJE), §§ 18 and 64, outlining the necessity of a «substantial majority» of «judges elected by their peers», in case of «mixed composition (judges and non judges)» of the Council for the Judiciary.

Moving on, the Integrity and Ethics Board – which plays a crucial role in proposing dismissal procedures for HCJ and HQCJ members as well as for disciplinary proposals – is composed of 6 members, 3 of whom are members of the HCJ and 3 of international organizations[19]. Its decisions are adopted if the majority of its members voted in favour, but in case of an equal number of votes, preference shall be given to the votes of the three national experts[20].

So, also in this case the CoE standard of «no less than half» of judges could be, in abstract, observed.

In this regard, it is worth noting that in practice, should the 11 judge-members of the HCJ do not find a unanimous agreement to propose 3 judges to be included in the composition of the Integrity and Ethics Commission, the latter could be composed of a majority of non-judge members[21].

In any case, even should this hypothesis occur, serious problems of compliance with the CoE standards would not seem to occur, since that Board has only proposal powers, while decision-making activity (both in dismissal and in disciplinary matters) lies within the competence of the HCJ, whose composition respects the «no less than half» requirement.

As a result, no problems seem to arise as to the composition of this body.

The Selection Board is another crucial body envisaged by the reform and it is in charge of the important selection process of the HQCJ members.

Its composition requires that 3 members be elected by the Congress of Judges and 3 by international experts, nominated by international and foreign organisations, with which Ukraine cooperates in the sphere of corruption prevention and combating in accordance with international treaties of Ukraine, to serve as members of the Public Council of International Experts (PCIE) established in accordance with the Law of Ukraine on the High Anti-Corruption Court.

Thus, with reference to this body too, the «no less than half» rule is accomplished.

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[19] Namely, pursuant to Art. 28-1 of the Law of Ukraine *On the High Council of Justice*, the 3 international expert are nominated by international and foreign organisations to the Public Council of International Experts, established in accordance with the Law of Ukraine *On High Anti-Corruption Court* with which Ukraine cooperates in the prevention and combatting corruption.

[20] See Art. 28-1 of Law of Ukraine *On the High Council of Justice* (*Vidomosti* of the *Verkhovna Rada* of Ukraine, 2017, no.7-8, p. 50 with subsequent changes): «Integrity and Ethics Board […] 4. The decision on issues within the competence of the Board is considered to be adopted if the majority of its members voted in favour. 5. In case of an equal number of votes "for" and "against", in accordance with this article, preference shall be given to the votes/decision of three international experts».

[21] Normally, in absence of particular selective requirements, in the context of the dynamics of "mixed composition" Councils for the Judiciary, when it comes to selection choices, experience reveals the judges' votes are channelled towards candidates who are judges, while those of non-judges towards candidates not belonging to the judiciary. Nevertheless, this empirical regularity may not occur in certain contexts, especially when the balance of power between the branches of State powers does not start from equitable conditions. It cannot therefore be ruled out that, in a situation in which the judge members are divided and in a position of subjection, while the non-judicial members present themselves compactly to the vote on at least one candidate, in the end it could turn out that the 3 members of the HCJ to be selected as members of the Integrity and Ethics Board may not be all judges. In this scenario a crucial role is played by the internal voting rules (choice of one candidate at a time or all three together, majority or unanimous decision, secret or manifest ballot, *etc.*).

In particular, the law expressly specify that the 3 components elected by the Congress of Judges must necessarily be chosen among their peers[22].

However, a clarification would be advisable with regard to the rule according to which the Selection Board decides by simple majority, but the three votes of the international experts are needed. *Verbatim*, Art. 95-1, par. 3, of the Law of Ukraine *On the Judiciary and the Status of Judges* (*Vidomosti* of the *Verkhovna Rada* of Ukraine, 2016, no. 31, p. 545 with subsequent changes), as amended by the Reform in exam, rules that «A decision of the Selection Board shall be considered approved if the majority of its members present at the meeting voted for this decision, provided that three persons from among those who voted in favour were international experts».

That provision does not convince at all, as it results in a "right of veto" attributed to each of the international experts[23].

The explanatory note and the additional information submitted by the Government of Ukraine in the framework of the execution process of the group of cases *Volkov v. Ukraine* clarifies that the 3 international experts members of the Selection Board are awarded such a "right of veto" in order to «contribute to the objectivity of the competition for the position of a member of the HQCJ».

Hence, it seems that Ukrainian politicians prefer to trust international experts – even awarding them with a peculiar "right of veto" – rather than members of their own judiciary.

So, the aforesaid "right of veto" could represent a precise and admitted sign of a deep lack of trust in the capacity of the Ukrainian judiciary and in general of its branches of State powers (in the Selection Board are not present event representatives of the President, Parliament, Lawyers, Prosecutors, Academics) to self-manage itself, to the point of being constantly subjected to the supervision of 3 international experts, endowed of "veto" powers over every decision of the Selection Board.

This odd voting system could entail both an infringement of the «substantial majority» of judges' recommendation and an invasion of judiciary self-government and domestic sovereignty by external international experts[24].

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[22] In order to abide by the "no less than half of judges elected by their peers" standard, is it actually provided, expressly, that the 3 components elected by the Congress of Judges must necessarily be chosen among their peers. Then, it is theoretically impossible that the Congress will elect, among the three members of its competence and in accordance with the selection criteria, non-judge members (prosecutors, academics, lawyers).

[23] The reasons underlying such a provision are, frankly, difficult to understand. It almost seems to present the features of a typical "post-war rule", through which foreign winners ensure control over the main domestic activities of the defeated country. More specifically, in the present case, it could be the sign of a general lack of trust in the capacity of the Ukrainian judiciary and State to self-manage itself, to the point of being constantly subjected to the supervision of 3 international experts, with "veto" powers over every decision of the "Selection Board".

[24] The regulatory provision according to which its decisions will be adopted by simple majority, «but the three votes of the international experts are needed» - that substantially awards each one of the international expert a "right of veto" - responds to objectivity and transparency aims to be satisfied, according to the explanations laid down by the national authorities. Nevertheless, such decisive influence of external international experts on the Judiciary self-government could concretely entail an infringement of the "substantial majority" of judges' CoE standard or, possibly, lay the groundwork for a paralysis of the works of the "Selection Board". Issues of possible delays and blockage of the activities of the "Selection Board" are also pointed out by the Venice Commission,

This critical issue is even more evident, if we consider that the Selection Board is in charge with selecting the members of the HQCJ, *i.e.* the central body of the new structure outlined by the reform.

With regard to the High Qualification Commission of the Ukrainian Judiciary (HQCJ), the fact that its 12 members are selected – although with margins of discretion that seem very wide and easily overrunning in arbitrariness[25] – by the Selection Board, suggests that, likely, 6 members will be represented by judges, and the other 6 by international experts or otherwise not belonging to the judiciary.

Accordingly, problems of compatibility with the «no less than half» CoE standard do not seem to arise.

Inter alia, members of Parliament and Government, Presidents of the Court and judges involved in self-government are not eligible: this is, in principle, a positive aspect, as it guarantees a pluralist and more democratic participation of the judges in self-government, favouring the participation of the base of the hierarchical pyramid of the judiciary[26].

The amended law also prevents components of the HQCJ to be members of political parties, trade unions, political associations[27].

However, with a view to avoiding possible imbalances and distortions due to voting systems[28], it would be preferable to specify (as done for the election of the members of the Selection Board), that at least 6 of the HQCJ members must be chosen among judges (even though not among Courts' Presidents nor judges involved in self-government)[29].

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with regard to the provision of Art. 95-1(8), of the Law of Ukraine *On the Judiciary and the Status of Judges* (*Vidomosti* of the *Verkhovna Rada* of Ukraine, 2016, no. 31, p. 545 with subsequent changes), as amended by the Reform, which provides that «Members of the High Qualification Commission of Judges of Ukraine shall be appointed by resolution of the High Council of Justice adopted at its meeting on the basis of minutes of the Selection Board signed by all its members which participated this meeting during the signing this resolution», thus seeming to mean that the minutes must be signed even by members who voted against the decision.

[25] At present, in the selection procedure no ranking and no scores of the candidates seem to be requested. The specific partition of competencies between "HCJ" and "Selection Board" in the selection procedure is also still obscure.

[26] See Art. 94 of the Law of Ukraine *On the Judiciary and the Status of Judges* (*Vidomosti* of the *Verkhovna Rada* of Ukraine, 2016, no. 31, p. 545 with subsequent changes), as amended by the Reform: «Article 94. Member of the High Qualification Commission of Judges of Ukraine. […] 7. Members of Parliament of Ukraine, members of the Cabinet of Ministers of Ukraine, chairpersons of courts, their deputies, secretaries, chairpersons of court chambers, their deputies, members of the Council of Judges of Ukraine, the High Council of Justice, the Ombudsman, persons who were held liable for corruption offences may not be appointed as members of the High Qualification Commission of Judges of Ukraine».

[27] See Art. 94 of the Law of Ukraine *On the Judiciary and the Status of Judges* (*Vidomosti* of the *Verkhovna Rada* of Ukraine, 2016, no. 31, p. 545 with subsequent changes), as amended by the Reform: «Article 94. Member of the High Qualification Commission of Judges of Ukraine. […] 2. […] Members of the High Qualification Commission of Judges of Ukraine may not be members of political parties, trade unions, participate in any political activity».

[28] *Supra*, footnote no. 21.

[29] The HQCJ will play a crucial part in the professional recruitment and evaluation process of judges, as well as in the vetting procedure of the Supreme Court judges. Selection Board and HQCJ are at the centre of the new system and the rule of non-eligibility of the Presidents of the Courts and judges involved in self-government appears to guarantee a more pluralist and democratic participation of the judges in self-government, favouring the participation of the bottom of the hierarchical pyramid of the Judiciary. That said, it transpires clearly that the

Furthermore, the Reform introduces a dismissal procedure of the members of the HCJ and of the HQCJ[30].

The architected system, based on the simple majority proposal of the Integrity and Ethics Commission and on the simple majority decision of the HCJ (provided that at least two international experts - members of the Integrity and Ethics Board have voted against the proposal of dismissal), does not seem to be in contrast with the European standards.

Not even the participation of 3 members of the HCJ forming part of the "Integrity and Ethics Commission" in the decision on the dismissal seems to pose problems, since these are administrative decisions that do not result in the dismissal from the judiciary, but only from the bodies in question (HCJ and HQCJ)[31].

That said, it would still be preferable that every decision regarding the dismissal from such bodies of constitutional relevance is linked to concrete and foreseeable parameters, very far from the vague and inconsistent envisaged criteria (such as «authority» and «trust» to the judiciary[32]).

In conclusion, the new "matryoshka" structure of the self-government system moulded by the Reform appears – with the above indicated precautions – as a whole in line with European standards, presenting, indeed, relevant positive aspects.

The appointment of 3 members of the Selection Board directly by the Congress of Judges and of 3 others by the international experts appears to be an element to welcome in the Reform.

In the new structure, indeed, the Selection Board will play an essential role, as it is in charge with choosing the 12 components of the HQCJ, which will perform a crucial part in the professional recruitment and evaluation process of judges, as well as in the vetting procedure of the Supreme Court judges[33].

Thus, the fact that Selection Board and the HQCJ are at the centre of the new system is, *ex se*, positive, as it enhances the influence of the Congress of Judges and of the international experts within their composition, to the detriment of the HCJ, in which there are as many as 10 members (the half) from the political, lawyers, prosecutors and academic world.

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composition of this body is an essential aspect: the new regulation states that its 12 members will be designated by the Selection Board. At present, the actual composition and operative rules of the Selection Board are not able to guarantee the presence, inside the HQCJ, of at least six judges (the half of its members). With the aim to avoid any possible imbalance or distortion due to the voting systems, it would be better to specify – for instance in the implementation regulation – that at least 6 of the HQCJ members must be chosen among judges.

[30] See Art. 96 the Law of Ukraine *On the Judiciary and the Status of Judges* (*Vidomosti* of the *Verkhovna Rada* of Ukraine, 2016, no. 31, p. 545 with subsequent changes), as amended by the Reform, and Articles 20 and 24 of the Law of Ukraine *On the High Council of Justice* (*Vidomosti* of the *Verkhovna Rada* of Ukraine, 2017, no.7-8, p. 50 with subsequent changes), as emended by the Reform.

[31] Different considerations will be made, instead, as to their participation in the disciplinary proceedings; see *infra*, paragraph 3.

[32] See amended Art. 96 of the Law of Ukraine *On the Judiciary and the Status of Judges* (*Vidomosti* of the *Verkhovna Rada* of Ukraine, 2016, no. 31, p. 545 with subsequent changes).

[33] *Infra*, paragraph 4.

Moreover, it seems to transpire from the Reform a general tendency to fragment the relevant institutional bodies for the judiciary and to drastically reduce their composition[34].

This trend does not imply, in itself, problems of attempting the "external" independence of the judiciary (provided that the minimum standard of «no less than half of judges elected by their peers» is respected) and could facilitate the speeding up of judges' recruitment, evaluation, promotion and disciplinary proceedings.

However, too narrow compositions (it's to highlight that within the Integrity and Ethics Board and the Selection Board only 3 judges are present each) could jeopardize the "internal" independence of the judiciary, considering that all the different components of the associated judiciary could not find adequate representation in bodies of such crucial importance[35].

In summary, the new structure that emerges seems to improve the role of the Congress of Judges and of the international experts, reducing the powers of the non-judicial component of the HCJ.

With only a few adjustments seen above, represented by the elimination of the right of "veto" of the international experts within the "Selection Board" and by the clarification that at least 6 members of the HQCJ must be chosen among judges, the Reform could, in *parte qua*, achieve the objective of guaranteeing a higher level of independence of the Ukrainian judiciary.

Tendentially positive considerations were also expressed by the Venice Commission, which in the opinion adopted in December 2019 highlighted that the composition of the bodies resulting from the Reform «[…] fosters the trust of the public and may help in overcoming any problems of corporatism»[36].

On the other hand, the Venice Commission stigmatized the proliferation of multiple bodies of self-government in the judiciary, which «[…] further complicates the system of judicial government bodies»[37] and pointed out that the presence of international experts in the "Selection Board" (with a "right of veto") and in the "Integrity and Ethics Board" in a permanent way might «[…] raise issues of constitutional sovereignty»[38].

3. *Amendments of the disciplinary proceedings: a possible negative impact in terms of Convention compliance*

This part of the Reform is the one that seems to present the most critical profiles, with likely immediate negative repercussions on the *Volkov group* of cases execution process.

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[34] For example, the reduction in the number of members of the High Qualification Commission of Judges from 16 to 12, as well as the restricted composition of important bodies like the Integrity and Ethics Board and the Selection Board (only 6 members each one).

[35] The rule of «no less than half of judges elected by their peers» is referred to «all levels of the judiciary and with respect for pluralism inside the judiciary»: see Appendix to Recommendation CM/REC/(2010)12, cited above, chapter IV, par. 27. About the importance of "internal independence", see also Chapter III of the Appendix to the aforesaid Recommendation CM/REC/(2010)12 and the Venice Commission *Report on the independence of the judicial system*, cited above, part I, paragraphs 68-72.

[36] See the Venice Commission Opinion, cited above, § 22.

[37] *Ibidem*, § 27.

[38] *Ibidem*, § 24.

The independence of judges, enshrined in the constitution or at the highest possible legal level, should demonstrate a clear division of authority between the executive, the legislature and the judiciary. Moreover, the procedures for appointment and dismissal of judges, which are key to judicial independence, should be based on objective criteria focused on professional merits and qualifications and not on the government's political considerations[39].

In *Volkov*, as well in the "twin" case *Kulykov and others* and in *Denisov* (limited to the violations *sub* Art. 6), shortcomings found by the Court concerned, in the perspective of Art. 6, the principles of an independent and impartial tribunal (as regards the composition of the disciplinary and judicial review bodies), the principle of legal certainty (as regards the absence of a limitation period for the disciplinary proceedings against the applicant, and the irregularities observed during the dismissal vote at the plenary meeting of Parliament), the principle of the tribunal established by law (as regards the composition of the Higher Administrative Court – "HAC"); in the view of Art. 8, the basic requirements of the "quality of law", referred to the lack of foreseeability of the notion of "breach of oath" (which could lead to the dismissal of judges), the scale of sanctions for disciplinary offences and the principle of proportionality.

In short, a general context so worrying as to lead the Court to affirm, literal, that «[…] the present case discloses serious systemic problems as regards the functioning of the Ukrainian judiciary. In particular, the violations found in the case suggest that the system of judicial discipline in Ukraine has not been organised in a proper way, as it does not ensure sufficient separation of the judiciary from other branches of State power. Moreover, it does not provide appropriate guarantees against abuse and misuse of disciplinary measures to the detriment of judicial independence, the latter being one of the most important values underpinning the effective functioning of democracies. 200. The Court considers that the nature of the violations found suggests that for the proper execution of the present judgment the respondent State would be required to take a number of general measures aimed at reforming the system of judicial discipline. These measures should include legislative reform involving the restructuring of the institutional basis of the system. Furthermore, these measures should entail the development of appropriate forms and principles of coherent application of domestic law in this field»[40].

Following these judgments, Ukrainian authorities carried out several legislative reforms aimed at remedying the serious shortcomings outlined by the Court in the field, both substantive and procedural, of disciplinary proceedings against judges[41], which were positively assessed by the Committee of Ministers in the framework of the execution monitoring process[42].

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[39] Even though, according to the Court's case-law, appointment of judges by the executive or the legislature is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role: see ECtHR 3 July 2007, no. 31001/03, *Flux v. Moldova (no. 2)*, § 27.

[40] See *Volkov*, cited above, §§ 199-200.

[41] *Infra*, footnote no. 65.

[42] Specifically, the Committee of Ministers noted with satisfaction the progress achieved on the issues concerning judicial discipline and careers, the new composition of the HCJ and its Disciplinary Chambers, the concerted constitutional amendments on judiciary, drafted in close consultation with the CoE, including the Venice Commission.

The amendments of the disciplinary proceedings enacted by Law No. 193-IX, although they do not seem to directly affect the content of the positive reforms already adopted by the Ukrainian authorities[43], they go in other ways to undermine the judge's right to fair disciplinary proceedings provided under Art. 6[44], in the specific viewpoint of the participation in a public hearing (§ 1), the cross examination (§ 3 d), the adequate time and facilities for the preparation of his/her defence (§ 3 b) and the presumption of innocence and ordinary rules on the burden of proof repartition (§ 2).

First of all, the amendment to Art. 47 paragraph 3 of the Law of Ukraine *On the High Council of Justice*, eliminating the possibility to postpone hearing even in case of impossibility to attend on the part of the judge, is clearly in breach of Art. 6 § 1 of the Convention (right to a fair and public hearing), not being able to be considered "fair" such disciplinary proceedings into which the accused is incapable to participate[45].

The Venice Commission pointed out high criticism on this aspect, highlighting that «Eliminating the possibility of postponing the hearing on disciplinary liability, even if the absence of a judge is justified, and then to conduct proceedings in absentia clearly contradicts the right to a fair trial under Article 6 ECHR»[46].

Secondly, the elimination of the need to identify persons filling a disciplinary complaint should be clarified at a domestic case-law level, unless a dangerous disciplinary procedure based on the "anonymity" system is introduced in Ukraine[47].

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[43] However, it is worth noting that should the participation in the decision of the disciplinary chamber of the High Council of Justice of the 3 judges who are members also of the Integrity and Ethics Board be envisaged, this provision would be in open contrast with the impartiality requirement of the judging body requested by Art. 6 of the Convention; in this regard, the text of the Reform doesn't clarify this issue. See *Oleksandr Volkov v. Ukraine*, cited above; ECtHR 9 November 2004, no. 41984/98, *Svetlana Naumenko v. Ukraine*, §§ 95-98 and ECtHR 13 November 2007, no. 33771/02, *Driza v. Albania*, § 78.

[44] The approach of the Court case-law is very clear: it is crucial to ensure that any measures leading to the removal or dismissal of judges should be accompanied by relevant legal guarantees and open to effective review in their entirety by an ordinary tribunal or other body exercising judicial powers (key finding in *Baka v. Hungary*, cited above). Additionally, as it ensues from the case-law of the Court, namely from the case ECtHR 26 February 2009, no. 29492/05, *Kudeshkina v. Russian Federation*, and the on-going execution process in that case, the disciplinary proceedings which sanctioned the applicant, a former judge, have to comply with procedural guarantees of Article 6. In the same sense, see also: ECtHR 28 March 2017, no. 45729/05, *Sturua v. Georgia*; ECtHR 12 October 2017, no. 13723/06, *Gabaidze v. Georgia*; ECtHR 23 May 2017, no. 33392/12, *Paluda v. Slovakia*; and ECtHR 7 December 2010, no. 18381/05, *Mishgjoni v. Albania.*

[45] See Art. 47 § 3 of the Law of Ukraine *On the High Council of Justice* (*Vidomosti* of the *Verkhovna Rada* of Ukraine, 2017, no.7-8, p. 50 with subsequent changes), as amended by the Reform: «Shall a judge, complainant be absent, the Disciplinary Chamber reviews the disciplinary case without them, with the exception of cases when a judge was not notified or notified with violations of part four of Article 49 hereof».

[46] See the above-mentioned Venice Commission Opinion, § 66: «[…] It is regrettable that the legislator excluded paragraph 4 which provided that, if the judge is not able to participate in the session of the disciplinary chamber for valid reasons, s/he can require to postpone the disciplinary review once, as this provision was a sound basis for ensuring on the one hand the respect of the right of the judges and celerity of the procedure on the other hand».

[47] See Art. 42 § 1 of the Law of Ukraine *On the High Council of Justice* (*Vidomosti* of the *Verkhovna Rada* of Ukraine, 2017, no.7-8, p. 50 with subsequent changes), as amended by the Reform: «Disciplinary proceedings shall be initiated upon receiving, pursuant to the Law of Ukraine "On the Judiciary and the Status of Judges", a complaint on a disciplinary offence of a judge, a report on a disciplinary offence committed by a judge, or if members of the

In other words, it would be better to specify that, if on the one hand it is possible to use an anonymous complaint as a mere "starting point" for disciplinary investigations, on the other hand, the anonymous report must be considered in itself devoid of any relevance as an evidence. Failing that, it would become very difficult for the accused judge to defend from such unidentified evidence (thus implying a breach of Art. 6 § 3 (d) – right to examine or have examined witnesses against him).

The additional provisions regarding the introduction of draconian terms aimed at speeding up the proceedings, eliminating the filter of complaints and opening the disciplinary sessions to the public, seem to give rise to some issues too[48], since the «the new shortened deadlines […] do not seem to be realistic […] leaving to the judges only three days to prepare their reply to allegations […]»[49], thus provoking a potential infringement of Art. 6 § 3 b).

Above all, the addition of paragraph 13 to Art. 106 of the Law of Ukraine *On the Judiciary and the Status of Judges* («[…] failure to provide information within the time period stipulated by the law […]» shall also entail disciplinary proceedings against judges not complying with the legal deadline) introduces into the Ukrainian disciplinary system a paradoxical rule, which radically infringes the right of defence of the accused judge, notably the right to remain silent and the right to non-self-incrimination.

In addition, merely as a hypothesis, we cannot but consider that a judge could potentially be made target of multiple ill-founded disciplinary complaints and proceedings, so that this rule would risk holding a judge – unjustly – inculpated, liable not for the originally assumed disciplinary violation, but for the one represented by not having promptly provided the information requested in multiple disciplinary proceedings as, simply, unable to do so in good time.

This Kafkaesque provision therefore entails a clear violation of Art. 6 § 2 (presumption of innocence and ordinary rules on the burden of proof repartition) and § 3 (b) of the Convention (right to have adequate time and facilities for the preparation of his defence)[50].

High Council of Justice identified (from any source) circumstances that can testify to a judge committing a disciplinary offence, or if initiated by the Disciplinary Chamber, Integrity and Ethics Board or by the High Qualification Commission of Judges of Ukraine in cases stipulated by the law (a disciplinary complaint)».

[48] See Articles 50 and 51 of the Law of Ukraine *On the High Council of Justice* (*Vidomosti* of the *Verkhovna Rada* of Ukraine, 2017, no.7-8, p. 50 with subsequent changes), as amended by the Reform.

[49] See the Venice Commission Opinion, cited above, § 65: «These shortened deadlines could easily result in unjustified decisions due to a lack of time on the side of the judges, but also for the HJC to prepare properly».

[50] The legitimate need for speed up disciplinary proceedings, above all in the light of the new short termination period of 3 years of the disciplinary offence, must be conjugated with the respect of the minimum standard of the rights of the defence enshrined in Art. 6 of the Convention. Ukraine national authorities still haven't explained how the introduction of such rules as the elimination of the possibility to postpone hearing even in case of objective impossibility of the judge to attend, the provision according to which not complying with the legal deadline to provide the information requested to the judge, shall also entail disciplinary proceedings against him/her and the abolition of the need for identification of the person filling a disciplinary complaint, could be interpreted as compatible with the right to participate in a public hearing (§ 1), the presumption of innocence and *onus probandi* repartition (§ 2), the right to have adequate time for the preparation of the defence (§ 3 b) and the right to have examined witnesses against (§ 3 d).

Furthermore, the preliminary filters to the disciplinary complaints and, above all, the power of self-dismissing disciplinary complaints are easily open to abuse, not allowing an effective control on the merits of the disciplinary reports.

Rather, issues of disciplinary complaints overload and of excessive length of disciplinary proceedings can be resolved in another and more appropriate way, for example by allowing a "summarized" decision, without the provision of a hearing, in the event of a manifestly unfounded complaint, decision in any case to be taken by the competent Disciplinary Chamber of the HCJ, and not autonomously by the body charged with the disciplinary proposal (namely, in the new system resulting from the Reform, the Integrity and Ethics Board).

In summary and in the light of the above, the Reform risks to expose the system of the judicial discipline in Ukraine to such weak points to entail new future violations of Art. 6.

As for the publicity of hearings, the need for participation, control and awareness of the community in the administration of justice - especially if concerning judges' disciplinary proceedings - should be considered prevailing over any other need to protect confidentiality and trust in the judiciary: transparency is to be considered a cornerstone value in democracy[51]. *In camera* proceedings should be considered as exceptional, here as for ordinary judicial deliberations[52].

In this regard, the introduction of a precise list of cases that allow "in private" hearing instead of a "public" one is welcomed, as it establish the rule of the "publicity" of the hearings, providing for exceptions in case of risk of disclosure of a «secret protected by the law» or of «information about intimate or other personal aspects of life of the individuals»[53].

Lastly, deep concern is raised by the envisaged creation of an «information portal for gathering information on the professional ethics and integrity of judges, candidates for the post of judge» (to be found in Article 87 of the Law of Ukraine *On the Judiciary and the Status of Judges*)[54].

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[51] Publicity of disciplinary hearings, introduced by the Reform, satisfies the need for participation, control and awareness of citizens in the judiciary. Disciplinary proceedings with "media" exposure, however, can harm the serenity of the judging body and seriously jeopardise its independence. In this regard, it should be monitored if domestic authorities already took or intend to take countermeasures, so that "public" disciplinary proceedings do not risk degrading to a "media disciplinary show".

[52] Generally, these are hypotheses related to the protection of the intimacy of the persons involved, or to serious reasons of public order or public health. Furthermore, it is worth noting that the publicity of the disciplinary proceedings could, in some cases, result in a protection measure for the same accused judge, when "internal independence" issues are at stake (by way of example, let's consider cases of retaliation between colleagues following whistleblowing or, again, hypothesis of electoral struggles between associative groups within the judiciary).

[53] See Art. 49 § 2 the Law of Ukraine *On the High Council of Justice* (*Vidomosti* of the *Verkhovna Rada* of Ukraine, 2017, no.7-8, p. 50 with subsequent changes), as amended by the Reform: «The review of the disciplinary case by the Disciplinary Chamber may be closed if: an open hearing can result in a disclosure of a secret protected by the law; it is necessary to prevent a disclosure of information about intimate or other personal aspects of life of the individuals participating in the hearing of the disciplinary case».

[54] It seems evident that such a generic provision sounds like a "medieval" rule, which potentially risks opening a real "witch-hunt" and giving wide space to arbitrariness in the judges' selection procedures.

4. *The envisaged* "repulisti" *of the Supreme Court and its impact on the execution of the* Volkov group *of cases*

Quoting *verbatim* the statements of the Venice Commission Opinion, «By amending Article 37(1) LJSJ, Law No. 193-IX reduces the maximum number of judges in the Supreme Court from 200 to 100. The explanatory memorandum to the draft Law does not refer to this provision and no convincing reasons as to why this number should be reduced to 100 within a short period of time and without impact assessment were given to the members of the Venice Commission's delegation»[55].

The Supreme Court restructuration process (*rectius*: *"repulisti"*) envisaged by the Reform is going to entail, at least, an hypothesis of "removal" of 100 judges (amounting to the half of those currently serving at the Ukrainian Supreme Court) from their current posts (Supreme Court), to others of lower level (second or first instance Courts)[56].

In the worst, the reform is even destined to result in a "mass dismissal" of half of the Supreme Court's judges[57].

According to the rationale and the purpose described in the explanatory note to the Draft Law, this legislative provision is not yet justified neither by objective exigencies of reorganization of the judicial system (such as reduction of the Supreme Court workload, structural reforms aimed at eliminating or reducing the competencies in charge of the third instance Court, ascertained ineptitude of the Supreme Court judges currently in service resulting by statistical data, *etc.*) nor by reason of reallocation of the available financial resources.

National authorities do not even refer to criminal or disciplinary proceedings currently involving such a large number of judges of the Supreme Court, that could justify such a radical intervention[58].

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[55] See Venice Commission Opinion, cited above, § 31.

[56] The irremovability of judges and their security of tenure are an essential core of judicial independence: judges should be appointed permanently until retirement age. As regards transfers, the fundamental principle is that judges shall not be transferred without their consent. This general principle is reflected in the Committee of Ministers Recommendation (2010)12, cited above, § 52: «A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system»; See also CCJE Opinion no. 1 (2001), cited above, § 60 (a).

[57] At the present time, this scenario cannot be considered as remote, since the expression «may be transferred» (instead of the more reassuring «shall be transferred») referred to the judges who are going to be unsuccessful as a result of the vetting procedure, doesn't exclude that an illegitimate hypothesis of indirect dismissal of judges by the Parliament will occur as the final outcome of the reform: see Final Provisions of the Law n. 193, Art. 7: «Judges of the Supreme Court who failed to pass the selection procedure envisaged in paragraph 5 of this section may be transferred to the relevant appellate courts, taking into account the rating, which results from the competitive selection».

[58] In this sense, see the Venice Commission Opinion, cited above, § 31: «The explanatory memorandum to the draft Law does not refer to this provision and no convincing reasons as to why this number should be reduced to 100 within a short period of time and without impact assessment were given to the members of the Venice Commission's delegation».

Given these premises, the hypothesis of removal that we are facing can abstractly find its justification only in a case of objective and generalized ineptitude to perform their duties of the current judges of the Supreme Court.

In this view, the impact of the Reform on the execution process of the *Volkov group* (specifically, of *Denisov*, but indirectly of *Volkov* and *Kulykov and others* too) cannot be seriously denied.

In *Denisov*, the dismissal of the applicant - a President of the Administrative Court of Appeal - was indeed the result of a vetting procedure regarding the managerial skills of the applicant, conducted by the competent domestic authorities (HCJ and HAC) in wide violation of the guarantees of independence and impartiality of the decisional bodies (non-judicial members were a majority in their composition).

It is therefore of essential importance to verify that the institutional bodies shaped by the legislative Reform as protagonists of the vetting procedure (HQCJ, Selection Board, Integrity and Ethics Board, HCJ, all in their new "matryoshka" structure and interaction)[59] respect the CoE standard of «no less than half of judges elected by their peers»[60] and that their status is awarded the typical guarantees of constitutional relevance bodies[61].

Secondly, more specific criteria than those, too vague and uncertain, currently provided («professional competence, ethics and integrity»), would be desirable, so as to avoid any risk of arbitrariness.

Above all, any reference to «ethics and integrity» should be banned by this kind of assessment, since these are parameters that do not belong to the "professional" competence of the judge, but to "deontological" profiles.

The serious suspicion that the purpose of this provision would aim to shift the deontological profiles from the scope of the disciplinary proceedings to the domain of the "professional" evaluation, in order to deprive judges from the guarantees of legal certainty, foreseeability and defence proper to the disciplinary proceedings rules, should be radically eliminated.

In this specific perspective, the impact of the Reform on the issues of the *Volkov* and *Kulykov and others* execution supervision process are evident.

The «abuse and misuse of disciplinary measures to the detriment of judicial independence»[62] are clearly attempted to be recycled in the envisaged vetting procedure, through the prevision of an evaluation of judges based on their «ethics and integrity» (*sic!*).

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[59] Notably, interrelation between HQCJ and HCJ and their respective role in the "vetting" procedure of the Supreme Court judges is not deeply clarified. The Venice Commission maintained, in the aforementioned Opinion, that Law No. 193-IX does not provide any criteria or procedure for this selection as the «[…] procedure for the selection of judges to the cassation courts within the Supreme Court shall be approved by the High Qualifications Commission of Judges of Ukraine, in agreement with the High Council of Justice» (§ 33).

[60] In detail, as explained above, it would be advisable the elimination of the right of "veto" in favour of the international experts within the Selection Board and the clarification that at least 3 members of the Selection Board and that at least 6 of the HQCJ members must be chosen among judges.

[61] In this regard, it would be preferable that every decision regarding the dismissal from such bodies of constitutional relevance is linked to concrete and foreseeable parameters, very far from the vague and inconsistent criteria currently envisaged (such as «authority» and «trust» to the judiciary).

[62] Mentioned from *Volkov*, cited above, § 199.

As a matter of fact, the risk that such a generic and priggish provision will resolve in a circumvention of the *Volkov* judgment (insofar as it «suggests that for the proper execution of the present judgment the respondent State would be required to take a number of general measures aimed at reforming the system of judicial discipline»[63]), is high and concrete, on the side of both the violation of Art. 6 and Art. 8.

As to Art. 6, the shift of the evaluation on «ethics and integrity» from the scope of disciplinary liability (which is its natural own) to that of the evaluation of professional skills, entails a manifest elusion of the new Ukrainian legislation aimed at achieving "fair" disciplinary proceeding for judges, already positively assessed in the previous meetings of the Committee of Ministers on the supervision of the *Volkov group* of cases.

In particular, all the procedural safeguards, strongly recommended by the Court[64] and recently introduced in the Ukrainian legislative framework (as to the composition of the HCJ and the HAC in the view of their independence and impartiality, as to the need for limitation periods for dismissal proceedings in respect of the principle of legal certainty[65]) will not find application in the vetting procedure predicted by the last Reform.

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[63] *Ibidem*, § 200.

[64] *Ibidem*, § 199: «The Court notes that the present case discloses serious systemic problems as regards the functioning of the Ukrainian judiciary. In particular, the violations found in the case suggest that the system of judicial discipline in Ukraine has not been organised in a proper way, as it does not ensure sufficient separation of the judiciary from other branches of State power […]».

[65] Notably, positive steps taken by the Ukrainian authorities may be summarised as follows:
1) As a first preliminary step, the Ukrainian authorities introduced amendments to the Constitution of Ukraine as regards the role of the Higher Council of Justice (HCJ) in the system of judicial appointments and dismissals (alleviating any role for the Parliament and eventually leaving only a decorative role to the President);
2) The authorities introduced a new law on the HCJ, which should consist of 21 members, with majority of its members – judges elected by judges, as well as regulations on potential conflict of interest;
3) The decisions of the HCJ were to be subjected to "full and sufficient" review by the Grand Chamber of the Supreme Court, i.e. body that has full jurisdiction according to the *Denisov* Grand Chamber judgment, § 65, to hear the case independently and impartially, with a possibility to fully review the award (the Supreme Court fully recomposed on the basis of new open and transparent procedure for filling judicial vacancies, with the help of the specially formed Higher Qualification Commission of Judges);
4) The bodies of executive (Ministry of Justice and the GPO) were excluded from the review of decisions taken as regards careers and dismissal of judges, involvement of Parliament is fully excluded, and involvement of the President is only ceremonial;
5) The domestic legislation introduced a three-year limitation period for disciplinary sanctions against judges, including their dismissals, the HCJ and the Supreme Court, subsequently, within a period from 2016 to the present moment, developed consistent judicial practice on the issues of disciplinary liability of judges;
6) The amended domestic legislation, *i.e.* the Law of Ukraine *On the Judiciary and the Status of Judges*, established a coherent list of acts for which relevant disciplinary sanctions, including dismissals by the HCJ, could be established. The scale of sanctions for individual disciplinary offences became clear and foreseeable in law and in practice;
7) Coherence, legal certainty and proportionality of sanctions were also ensured through the alignment of disciplinary sanctions with other types of judicial liability, including the criminal liability of a judge;
8) The law provides that objective criteria to evaluate judicial work, including judicial dossier are being a part of assessment of a judge's professional qualities. A judge's professional competence is assessed according to the following indicators: 1) legal knowledge; 2) practical skills and ability to apply the law; 3) efficiency in administration of justice; and 4) activities aimed at professional development. The information in the judicial dossier is also used in other procedures concerning judges: disciplinary proceedings by the HCJ and its Chambers,

In addition, the specific partition of competencies between HQCJ, HCJ and Selection Board in the selection procedure is, at present, still obscure[66].

Not even the Reform seems to specify how and before which judicial bodies the vetted-out judges will be able to obtain a fair judicial review[67].

As to Art. 8, it emerges *ictu oculi* that locutions like «breach of oath», «ethics» and «integrity», all belong to the same family of vague and inscrutable deontology standards affecting the basic requirements of the "quality of law": in *Volkov* and *Kulykov and others*[68], so as in *Denisov*[69], the Court stigmatized that «almost any misbehaviour by a judge, occurring at any time during his or her career, could be interpreted, if desired by a disciplinary body, as a sufficient factual basis for a disciplinary charge of "breach of oath" and lead to his or her removal from office»[70].

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attestation procedures for judges of the first instance and appeal courts, and selection of judges for the new composition of the Supreme Court. Information on the number of quashed or amended decisions is not a sole or conclusive element for assessment of work of a judge;

9) Judges can also appeal to the Supreme Court against decisions taken with regard to their careers.

66 See also the criticism expressed *supra* about the composition of these bodies, in footnote no. 59.

67 For a review to be Convention-compliant, according to the ECtHR case-law, it has to be based on legislation compatible with requirements of foreseeability and legal certainty; minimal and technical or ceremonial involvement of the political bodies (Parliament and President) and executive (especially General Prosecutor's Office and the Ministry of Justice); institutional setting has to secure effective functioning of an independent and impartial review body, both from the point of view of its composition (more than half of member – judges elected by judges), rules of procedure, structure as well as possibility to have access to a court, with a full and sufficient judicial review; differentiation of roles of the independent inspector, review body and appeal body is of interest too. Timely examination of disciplinary complaints and enforcement of decisions of such bodies should be ensured.

68 See *Volkov*, cited above, §§ 166, 180, 182 and 185: «The dismissal of the applicant from the post of judge affected a wide range of his relationships with other persons, including relationships of a professional nature […] Moreover, the reason for the applicant's dismissal, namely breach of the judicial oath, suggests that his professional reputation was affected […] 180. As to the present case, there is no indication that at the time of the determination of the applicant's case there were any guidelines or practice establishing a consistent and restrictive interpretation of the notion of "breach of oath" […] 182. Moreover, domestic law did not set out an appropriate scale of sanctions for disciplinary offences and did not develop rules ensuring their application in accordance with the principle of proportionality […] 185 […] the absence of any guidelines and practice establishing a consistent and restrictive interpretation of the offence of "breach of oath" and the lack of appropriate legal safeguards resulted in the relevant provisions of domestic law being unforeseeable as to their effects […]». In the same terms, see *Kulykov and others*, cited above, §§ 135 and 138.

69 See, *a contrario*, *Denisov*, cited above §§ 103, 108 and 126: «103. Complaints concerning the exercise of professional functions have been found to fall within the ambit of "private life" when factors relating to private life were regarded as qualifying criteria for the function in question and when the impugned measure was based on reasons encroaching upon the individual's freedom of choice in the sphere of private life […] 108. On the basis of that approach, the Court has found that the dismissal of a judge on the grounds of a violation of his professional duties amounting to a breach of the judicial oath affected a wide range of his professional and other relationships […] 126. […] The decisions in the applicant's case concerned only his managerial skills, while his professional role as a judge was not touched upon. This limited area of scrutiny and criticism cannot be regarded as relating to the core of the applicant's professional reputation. In that regard the present case differs in substance from Oleksandr Volkov (cited above), in which the applicant was criticized and received a disciplinary sanction for his performance as a judge».

70 See *Volkov*, cited above, § 185.

As a consequence of the last legislative Reform, the same inauspicious scenario is evidently going to occur with regard to the vetting procedure: nearly any misbehaviour by a Supreme Court's judge, occurring at any time during its career, could be interpreted, if desired by the HQCJ and the HCJ, as a sufficient factual basis for a negative assessment as to «ethics and integrity» and lead to its removal from the Supreme Court, and probably from the judiciary as a whole[71].

Basically, once that the amendments recently introduced to the domestic legislation have clearly resolved the issues outlined by the Court in the field of substantive law of lack of foreseeability and certainty of notions like «breach of oath»[72], as well the procedural shortcomings in terms of composition of the disciplinary and review bodies, limitation periods of the offence, appropriate scales of disciplinary sanctions and principle of proportionality[73], the same issues are now likely to occur in the course of the envisaged vetting procedure, where the total lack of foreseeability of the notion of «ethics and integrity» (as well the vagueness of that of «professional competence»[74]) and the lack of procedural guarantees and of a specific provision of a "fair" mechanism of judicial review, are opening the ground to the widest arbitrariness in the envisaged vetting procedure[75].

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[71] *Supra*, footnote no. 57. In this regard, see also the aforesaid Venice Commission Opinion, §§ 34 and 56: «34. Section 7 of the Final Provisions of Law No. 193-IX provides that "Judges of the Supreme Court who failed to pass the selection procedure envisaged in paragraph 5 of this section may be transferred to the relevant appellate courts, taking into account the rating, which results from the competitive selection." This means that judges who have a rating that is lower than that of the 100 judges with the best rating will either be transferred to the courts of appeal, which would effectively mean a demotion, or – supposedly those with the lowest rating – may even be dismissed as Section 7 of the Final Provisions only provides that the lower rating judges "may" be transferred to the courts of appeal. […] the HQCJ would have discretion in deciding whether judges, who are not selected for continued service in the Supreme Court, shall be transferred to an appellate court or not. Since the draft Law does not provide for an alternative, it appears natural to conclude that the High Judicial Council may choose to dismiss these judges. However, the criteria the HQCJ is supposed to use when deciding on the transfer are not laid down in the law. This creates a threat to the independence of the judiciary».

[72] The Constitutional amendments and the *Law on the Judiciary and the Status of Judges* developed a comprehensive and detailed system of disciplinary liability of judges. In addition to the ethical norms regulating judicial conduct, developed by the Council of Judges of Ukraine, in a Code of Judicial Ethics, the Constitution provides for the grounds of dismissal of a judge for, *inter alia*, committing «a grave disciplinary misconduct, gross or systematic neglect of duty, which is incompatible with the status of a judge or which disclosed his/her incompatibility with the occupied post»; see also *supra*, footnote no. 65, under par. 6).

[73] The *Law on the Judiciary and the Status of Judges* envisages 19 main grounds for disciplinary liability of judges with 6 types of sanctions, based on their severity. Additionally, it provides for dismissal of a judge for a "grave disciplinary misconduct" that might be based on 7 constituent elements. See also *supra*, footnote no. 65 under par. 6).

[74] To date, in the selection procedure no ranking and no scores of the candidates seem to be requested. Conversely, the actual system of assessment of a judge's professional qualities is provided with higher standard of clarity and foreseeability: see *supra*, footnote no. 65 under paragraphs 8) and 9).

[75] This critical aspect has also been well explained by the Venice Commission in the aforesaid Opinion, where it is reported that «While not formally a disciplinary measure, a negative result of the evaluation procedure entails negative consequences for the judges' irremovability and security of tenure, which is an effect that resembles the effect of disciplinary sanctions. Moreover, unlike disciplinary measures which are based on specific violations, the evaluation criteria are general and leave a wide margin of discretion to the evaluating body» (§ 60).

In conclusion, the planned "professional" assessment, far from appearing capable of strengthening the skill and competence level of the Supreme Court judges, risks becoming the "trojan horse" trough which let invade again the Ukrainian judiciary by vague, generic and elusive deontological criteria, subtracting them to their proper field of application: the "fair" disciplinary proceedings, recently provided with sufficient conventional standard of guarantee by the Ukrainian Lawmaker[76].

In this regard, it is worth noting that the "margin of appreciation"[77] acknowledged to the Member States (and, specifically, to the legislative branch of the State power) as to the

[76] The need for a sharp and clear distinction between professional evaluation process and disciplinary proceedings is accurately emphasized by both the Consultative Council of European Judges and the Venice Commission: see the afore-cited Venice Commission Opinion, § 51: «Both the Venice Commission and the Consultative Council of European Judges (CCJE) have maintained that in order not to endanger judicial independence, evaluations and disciplinary measures and processes should be clearly differentiated. CCJE Opinion no. 17 indeed concludes: "Some consequences, such as the dismissal from office because of a negative evaluation, should be avoided for all judges who have obtained tenure of office, except in exceptional circumstances"».

[77] For a brief literature review of the "margin of appreciation doctrine" and its implications with the "principle of subsidiarity" see, among others: D. SPIELMANN, *Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, in *Camb. YB. Eur. Leg. St.*, University of Cambridge, CELS Working Paper Series, 29 February 2012; *Ibidem*, *En jouant sur les marges - La Cour européenne des droits de l'homme et la théorie de la marge d'appréciation nationale: abandon ou subsidiarité du contrôle européen?*, in *Journal des tribunaux Luxembourg*, 2010, n°10; R. BERNHARDT, *Thoughts on the Interpretation of Human-Rights Treaties, Protecting Human Rights: The European Dimension*, in F. MATSCHER, H. PETZOLD (eds.), *Protecting Human Rights: the European Dimension*, 1988; P. GALLAGHER, *The European Convention on Human Rights and the Margin of Appreciation*, in *UCD Working Papers in Law, Criminology & Socio-Legal Studies,* Research Paper No. 52/2011; L. GARLICKI, *The European Court of Human Rights and the "Margin of Appreciation" Doctrine. How Much Discretion is Left to a State in Human Rights Matters?*, in *Administrative Regulation and Judicial Remedies*, Taipei, Taiwan, Institutum Iurisprudentiae Academia Sinica, 2011, p. 53 ss.; Y. ARIA-TAKASHI, *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR*, Antwerp, 2002; S. GREER, *The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?*, 2010, UCL Human Rights Review; C. ROZAKIS, *Through the Looking Glass: An "Insider"'s View of the Margin of Appreciation*, in *La conscience des droits. Mélanges en l'honneur de Jean-Paul Costa*, Paris, 2011, p. 526 ss.; M. DE SALVIA, *Contrôle européen et principe de subsidiarité: faut-il encore (et toujours) émarger à la marge d'appréciation?*, in *Protection des droits de l'Homme: la perspective européenne. Mélanges à la mémoire de Rolv Ryssdal*, Carl Heymanns Verlag KG, 2000, p. 373 ss.; R. ST. J. MACDONALD, *The margin of appreciation in the jurisprudence of the European Court of Human Rights*, in *Coll. Courses Ac. Eur. Rev.*, 1992, p. 103 ss.; R. ST. J. MACDONALD, *The margin of appreciation*, in R. ST. J. MACDONALD, F. MATSCHER, H. PETZOLD, *The European system for the protection of human rights*, The Hague, 1996, p. 83 ss.; P. MAHONEY, *Marvellous richness of diversity or invidious cultural relativism?*, in *Hum. Rights Law Jour.*, 1998, p. 1 ss.; T. O'DONNEL, *The margin of appreciation doctrine: standards in the jurisprudence of the European Court of Human rights*, in *Hum. Rights Quart.*, 1982, p. 474 ss.; J. CALLEWAERT, *Quel avenir pour la marge d'appréciation?*, in *Mélanges à la mémoire de Rolv Ryssdal, Protection des droits de l'homme: la perspective européenne*, Carl Heymanns Verlag KG, 2000, p. 147 ss.; M. DELMAS-MARTY, M-L. IZORCHE, *Marge nationale d'appréciation et internationalisation du droit. Réflexions sur la validité formelle d'un droit commun pluraliste*, in *Rev. Int. Dr. Comp.*, 2000, p. 753 ss.; S. GREER, *La marge d'appréciation: interprétation et pouvoir discrétionnaire dans le cadre de la Convention européenne des droits de l'homme*, Strasbourg, Les éditions du Conseil de l'Europe, Dossier sur les droits de l'homme n°17, 2000; E. KASTANAS, *Unité et diversité: notions autonomes et marge d'appréciation des États dans la jurisprudence de la Cour européenne des droits de l'homme*, Bruxelles, 1996; A-D. OLINGA, C. PICHERAL, *La théorie de la marge nationale d'appréciation dans la jurisprudence récente de la Cour européenne des droits de l'homme*, in *Rev. Trim. Dr. homme*, 1995, p. 567 ss.; F. TULKENS, L. DONNAY, *L'usage de la marge d'appréciation par la Cour européenne des droits de l'homme. Paravent juridique superflu ou mécanisme indispensable par nature?,* in *Rev. Sc. Cr. Dr. Pèn. Comp.*, 2006, p. 3 ss.; P. WACHSMANN, *Une certaine marge d'appréciation- Considérations sur les variations du contrôle européen en matière de liberté d'expression*, in *Mélanges en l'hommage à*

organization of the judicial systems and the allocation of the available financial resources, seems to leave little space of intervention to the Council of Europe.

The risk that the Reform is aimed at "punitive" purposes against the current Supreme Court judges cannot be excluded, especially in light of the lack of explanations of the objective reasons that should justify such regulatory intervention.

Anyway, the guarantee of irremovability of the judge is likely to be easily circumvented, since the Reform in question could *a posteriori* be interpreted and justified as a reorganization of the judicial system[78], which peacefully admits exceptions to the principle of irremovability[79].

Pierre Lambert: Les droits de l'homme au seuil du troisième millénaire, Bruxelles, 2000, p. 1017 ss.; G. VAN DER MEERSCH, *Le caractère autonome des termes et la marge d'appréciation des gouvernements dans l'interprétation de la Convention européenne des Droits de l'Homme*, in *Protection des droits de l'Homme: dimension européenne. Mélanges en l'honneur de Gérard J. Wiarda*, Carl Heymanns Verlag, 1988, p. 201 ss.; H. C. YOUROW, *The margin of appreciation doctrine in the dynamics of european human rights jurisprudence*, The Hague, 1996; N. SHUIBHNE, *Margin of appreciation: national values, fundamental rights and EC free movement law,* in *Eur. Law. Rev.*, 2009, p. 230 ss.; J. SWEENEY, *A «margin of appreciation» in the internal market: lessons from the European Court of Human Rights*, in *Leg. Iss. Ec. Int. Law*, 2007, p. 27 ss.; I. RASILLA DEL MORAL, *The increasingly marginal appreciation of the Margin of appreciation doctrine*, in *Germ. Law jour.*, 2006, p. 611 ss.; G. LETSAS, *Two concepts of the margin of appreciation*, in *Oxf. Jour. Legal St.*, 2006, p. 705 ss.; W. G. VAN DER MEERSCH, *Le caractère autonome des termes et la marge d'appréciation des gouvernements dans l'interprétation de la Convention européenne des droits de l'homme*, in F. MATSCHER AND H. PETZOLD (eds.), *Protecting Human Rights: The European Dimension Studies in honour of de Gerard J. Wiarda*, Cologne, Heymanns, 1988, p. 201 ss.; S. VAN DROOGHENBROECK, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme. Prendre l'idée simple au sérieux*, Bruxelles, 2001, p. 483 ss.; G. LETSAS, *A Theory of Interpretation of the European Convention on Human Rights*, foreword by D. SPIELMANN, Oxford, 2010, p. 80 ss.

[78] Furthermore, as expected, the "explanatory notes" subsequently provided for by the national Authorities also clarify the reasons behind the halving of the number of judges of the Supreme Court, *i.e.* the reduction of the Supreme Court workload through structural reforms aimed at eliminating or reducing the competencies in charge of the third instance Court: «[…] the procedure for admission of cassation appeals does not contribute to the Supreme Court's fulfilment of its primary task – to ensure the consistency and unity of judicial practice and, consequently, to respect the principle of legal certainty as one element of the rule of law. In this regard, we consider it necessary to introduce a system of admission and filters for cassation proceedings, namely the cassation proceedings may take place in exceptional cases when it is necessary to resolve the issue of application of substantive and/or procedural law, and not for the possibility "consideration for consideration" of the cassation complaint. At the same time, the above systems of admission for cassation proceedings will not only ensure the formation of unity of judicial practice but will over time significantly reduce the quantitative burden on this court. The draft law also improves several rules with the intention of preventing the abuse of procedural rights by the participants of the case and to optimise the procedure for considering cases». In this perspective, the restructuration operation can abstractly and formally appear fully legitimate, if concretely implemented in accordance with the CoE standards.

[79] On this aspect, the Venice Commission, in the aforementioned Opinion, underlines effectively the problem of the inverted logical and chronological sequence between reforms aimed at restructuring the shape of the Supreme Court and drastic halving of its judges, since the formers should precede - and do not follow as in the specific case - the last one: «The delegation of the Venice Commission learned that another draft Law is being prepared to introduce procedural filters limiting access to the Supreme Court with the purpose of changing it to a "real" court of cassation, which would examine points of law only. In fact, the Supreme Court provides so-called "comprehensive review". The Supreme Court has a backlog of some 70.000 cases (including from the former high specialised courts) and receives some 360 new cases every day. […] In principle, the goal to reduce access to the Supreme Court and to limit it to decide legal issues rather than performing comprehensive review is a valid purpose for reform. However, the sequencing of such a reform is not respected by Law No. 193-IX. First the filters should be adopted and the Supreme Court should deal with its backlog in its current composition, because

It is therefore of crucial relevance that the vetting process will be at least carried out by the HQCJ, in the envisaged composition (guaranteeing the presence of 50% of judges).

Also, more specific criteria than those, too unclear and abstruse, currently provided («professional competence, ethics and integrity»), would be desirable, so as to avoid any risk of arbitrariness[80].

The serious suspicion is that the purpose of this provision is to shift the deontological profiles from the scope of the disciplinary proceedings to the domain of the "professional" evaluation, for the purpose of depriving judges from the guarantees of foreseeability and defence proper to the disciplinary proceedings' rules.

Such risk can be neutralized only by eliminating any reference to «ethics and integrity» from the parameters of the vetting procedure.

In other words, in this delicate area, further ambiguities or uncertainties cannot be overly admitted: either a specific and personal misconduct of the single judge falls within the scope of a disciplinary (or eventually criminal) offence, and then the judge will be subjected to "fair" disciplinary (or criminal) proceedings, only at the outcome of which s/he can be sanctioned in the respect of the proportionality criteria, even with removal or dismissal, or that conduct, ascertained as irrelevant from a disciplinary (or criminal) point of view, cannot and must not have any professional relevance under the shady and vacillating criterion of «ethics and integrity», giving space to dangerous and unacceptable arbitrariness in the vetting procedure[81].

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the filters will have an effect only for future cases (a retroactive application removing pending cases from the docket would raise serious issues of access to the courts under Article 6 ECHR). Once the backlog is settled and the incoming case-load is reduced by the filters, it may be possible to reduce the number of judges gradually […]» (§§ 47 and 49).

[80] These risks were widely stressed by the Venice Commission, see the aforementioned Opinion, § 57: «The only criteria for selection mentioned in Law No. 193-IX "professional competence, ethics and integrity" are not detailed enough for their application in practice. By giving the HQC (under the control of the HJC) the competence to specify the criteria (as part of the procedure) within this wide framework and then to apply these criteria, Article 7 of the Final Provisions provides to the HQC very wide discretion, which is not compatible with the principle of judicial independence and the irremovability of judges. If a re-evaluation of some judges of the Supreme Court were indeed undertaken, at least the substantive evaluation criteria should be the same as those that already exist under the law in order to avoid arbitrariness».

[81] With regard to the close link between vetting procedures and principles of irremovability and independence of the judiciary, see *Fruni v. Slovakia*, cited above, § 145: «[…] the Special Court judges could be recalled if they ceased to meet the security vetting criteria. In that context the Court reiterates that, in general, the irremovability of judges by the executive during their term of office must be considered a corollary of their independence and thus included in the guarantees of Article 6 § 1 of the Convention (see, for example, Campbell and Fell v. the United Kingdom, 28 June 1984, § 80, Series A no. 80)».

For an interesting and epiphanic general definition of "vetting" as a typical "post-conflict" procedure, see the publication *Rule-of-Law Tools for Post-conflict States. Vetting: An Operational Framework* (HR/PUB/06/5, 2006), by the Office of the United Nations High Commissioner for Human Rights, cited in ECtHR 17 October 2019, nos. 58812/15 and 4 others, *Polyakh and others v. Ukraine*, § 114: «Vetting is an important aspect of personnel reform in countries in transition. Vetting can be defined as assessing integrity to determine suitability for public employment. Integrity refers to an employee's adherence to international standards of human rights and professional conduct, including a person's financial propriety. Public employees who are personally responsible for gross violations of human rights or serious crimes under international law revealed a basic lack of integrity and breached the trust of the citizens they were meant to serve. The citizens, in particular the victims of abuses, are unlikely to trust and rely on a public institution that retains or hires individuals with serious integrity deficits,

In conclusion, in their perspective lately assumed, the national Authorities emphasize the objective of reorganization of the judicial system, namely of the Supreme Court structure, in view of the envisaged changes for the reduction of the Supreme Court workload through systemic reforms aimed at reducing the competencies in charge of the third instance Court (new procedures for admission of Cassation appeals, introduction of a system of admission and filters for cassation proceedings, *etc.*): this scenario, potentially, could legitimize the operation of restructuration of the Supreme Court, destined to change into a Court of Cassation[82].

Nevertheless, in the same perspective, if the need for halving the number of Supreme Court derives from the abovementioned "objective" purpose of the Reform, there is no logic reason why the Reform consider appropriate to include, among the selection criteria of the 100

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which would fundamentally impair the institution's capacity to deliver its mandate. Vetting processes aim at excluding from public service persons with serious integrity deficits in order to (re-)establish civic trust and (re-)legitimize public institutions. Integrity is measured by a person's conduct. Vetting processes should, therefore, be based on assessments of individual conduct. Purges and other large-scale removals on the sole basis of group or party affiliation tend to cast the net too wide and to remove public employees of integrity who bear no individual responsibility for past abuses. At the same time, group removals may also be too narrow and overlook individuals who committed abuses but were not members of the group. Such broadly construed collective processes violate basic due process standards, are unlikely to achieve the intended reform goals, may remove employees whose expertise is needed in the post-conflict or post-authoritarian period, and may create a pool of discontented employees that might undermine the transition».

Similar considerations are expressed in ECtHR 3 September 2015, no. 22588/08, *Soro v. Estonia*, concurring opinion of judge Pinto de Albuquerque, §§ 7-13: «9. […] Every lustration mechanism should provide for due-process guarantees, including the initiation of proceedings within a reasonable time and generally in public; notification of the parties under investigation of the proceedings and the case against them; an opportunity for those parties to prepare a defence, including access to relevant data; an opportunity for them to present arguments and evidence, and to respond to opposing arguments and evidence, before a body administering the vetting process; the opportunity to be represented by counsel; and notification to the parties of the decision and the reasons for the decision. As a general rule, a hearing should be guided by the principle of equality of arms […] 13. Hence, disclosure mechanisms for lustration purposes, namely national security, public safety and the rights and freedoms of others, are acceptable if and when they have a clear and precise lawful basis, the interference with private life complies with the test of necessity and the test of proportionality, and the law is applied individually, which implies the prohibition of collective guilt, and fairly, which requires at least the acknowledgment of basic procedural guarantees such as the right of defence, the presumption of innocence and the right of appeal to a court. To put it in Convention terms, disclosure mechanisms for lustration purposes, such as the one implemented in Estonia, must comply with the procedural standards akin to those of the criminal limb of Article 6 of the Convention».

[82] Serious doubts are expressed by the Venice Commission, in the aforementioned Opinion, with reference to the actual possibility of qualifying the Reform operation carried out by the Ukrainian authorities, as a whole "reform of the organization of the judicial system", which could abstractly justify a judges' transferral against their will: «[…] The question is therefore whether the changes introduced with Law No. 193-IX – and possibly additional draft laws being prepared – can be interpreted as a "reform of the organisation", which is a concept that has to be interpreted narrowly. Clearly, neither a reorganisation within a court nor a simple reduction of the number of judges are covered by this exception, which has to be interpreted narrowly. 39. In this case, the Ukrainian authorities argue that the reduction of judges in the Supreme Court and their subsequent transfer would be part of a general reform to transform the Supreme Court into a court of cassation. However, the explanatory note to the draft Law makes no claim of a general reform which would require a reduction of judges […]» (§§ 38-39).

judges to be removed, together with «professional competence», other parameters linked to «ethics and integrity».

Actually, the most natural and appropriate ground to assess (and it is certainly unavoidable and crucial to do so) the level of morality and integrity of a judge, is that of the disciplinary proceedings, now endowed - thanks to the reforms adopted in the framework of *Volkov group* execution - of the necessary requisites of legal certainty, foreseeability and guarantees of the right of defence.

Furthermore, if the reason of the reorganization of the Supreme Court can be lawfully found in the "objective" need to reorganize the structure of the various instances of jurisdiction, then any profile of "subjective" liability for the downgrading of the Supreme Court judges, at the outcome of the vetting procedure, should be *a priori* excluded: given the above, the vetted-out Supreme Court's judges could not be dismissed by the judiciary, but rather simply transferred to other instances of jurisdiction (Court of Appeal).

It appears essential, then, that the same social and economic status be guaranteed to the approximately 100 judges who are going to be "unsuccessful" as a result of the vetting procedure, even though transferred to lower courts[83].

Any possibility of their dismissal should therefore be eradicated, representing an illegitimate hypothesis of indirect dismissal of the judges by the Parliament.

5. *Remuneration issues*

The lack of financial autonomy of the judiciary, unlike the legislature, represents a typical and historic weak point of this branch of the State powers, through which it is possible to undermine their balance.

Consequently, compliance with provisions and parameters outlined at an international level is of paramount relevance.

In this regard, the *European Charter on the Statute for Judges* of 1998 states that «Judges exercising judicial functions in a professional capacity are entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thereby impairing their independence and impartiality»[84].

In similar sense, the Venice Commission, in the *Report on the independence of the judicial system*, maintains that «[…] for judges a level of remuneration should be guaranteed by law in conformity with the dignity of their office and the scope of their duties. Bonuses and non-

[83] See *Measures for the effective implementation of the Bangalore Principles of judicial conduct*, adopted by the Judicial Integrity Group at the Meeting held in Lusaka, Zambia, on 21 and 22 January 2010, § 14.2: «The salaries, conditions of service and pensions of judges should be guaranteed by law, and should not be altered to their disadvantage after appointment». If the only tolerable justification of the reorganization of the Supreme Court can be found in the "objective" need to reorganize its structure, then any profile of "subjective" liability for the downgrading of the Supreme Court judges should *a priori* be excluded. Accordingly, also the indirect punishment represented by a salary reduction following the failure in the vetting procedure cannot be considered rational and accepted.

[84] *European Charter on the Statute for Judges*, cited above, § 6.1; see also CCJE Opinion n. 1 of 2001, cited above, § 61.

financial benefits, the distribution of which involves a discretionary element, should be phased out»[85].

Also, the *Measures for the effective implementation of the Bangalore Principles of judicial conduct* provide that «The salaries, conditions of service and pensions of judges should be adequate, commensurate with the status, dignity and responsibilities of their office, and should be periodically reviewed for those purposes […]. The salaries, conditions of service and pensions of judges should be guaranteed by law, and should not be altered to their disadvantage after appointment»[86].

In addition, relations and influence between remuneration level and corruption are recognized and highlighted in the CCJE Opinion no. 21 of 2018. In particular, Point B) of *Factors leading possibly to corruption among judges*, states that «Poor working conditions, which include insufficient salaries and social benefits, poor infrastructure and equipment, along with a heavily understaffed judiciary and the like, can motivate a judge to accept an improperly offered favour more easily»; accordingly, Point g) of *Conclusions and recommendations* maintains that «Adequate salaries, retirement pensions and other social benefits, a manageable workload, a proper working infrastructure and job security for both judges and court staff are vital for the legitimacy and good reputation of a judicial system. These are also important safeguards against corruption in the judiciary»[87].

With specific regard to the hypothesis of wages reduction, although the issue is disputable, as it is connected with public finances reasons, every hypothesis of judges' wage reduction should be approached with proportionality criteria, avoiding unequal treatment of judges not only with respect to prosecutors, but also to other categories of high rank public officials (including Parliamentarians)[88].

About this, the *Report on judicial independence and impartiality in the Council of Europe member States in 2017* provides indeed that: «Even in times of economic crisis, the legislative and executive powers of various member States should understand that a significant reduction in judges' salaries is a potential threat to judges' independence and to the proper administration of justice, and may jeopardise (objectively and subjectively) judges' work. Such measures, if necessary, should always be limited in time. 37. Some European countries facing an economic crisis have opted for a cut in the salaries of public officials, including judges. Regardless of the rationale behind such measures, judicial remuneration cannot be reduced by a greater proportion than that of other public officials. Otherwise this would violate the principle of equality established as a general principle of law and it would contradict Article 54 of Rec(2010)12»[89].

Lastly, by the Explanatory Note of the CM Recommendation (2010)12, «Judges' remuneration is an important element to address when dealing with independence and impartiality […] An adequate level of remuneration is a key element in the fight against

[85] Venice Commission *Report on the independence of the judicial system*, cited above, part I, § 51.
[86] *Measures for the effective implementation of the Bangalore Principles of judicial conduct*, cited above, §§ 14.1 and 14.2.
[87] CCJE Opinion No. 21 (2018) on *Preventing Corruption among judges*, adopted in Zagreb on 9 November 2018.
[88] *Supra*, footnote no. 83.
[89] *Report on judicial independence and impartiality in the Council of Europe member States in 2017*, prepared by the Bureau of the CCJE, adopted in Strasbourg on 7 February 2018, §§ 36-37.

corruption of judges and aims at shielding them from any such attempts. […] Public policies aiming at the general reduction of civil servants' remuneration are not in contradiction with the requirement not to reduce specifically judges' remuneration (Recommendation, paragraph 54)»[90].

In the light of the aforementioned criteria enshrined at international level, it is possible to assume that, since judges' retribution is a domain in which Member States are generally given a certain margin of appreciation, several factors can legitimize a judge's salary reduction without jeopardizing the principle of judicial independence, such as keeping an adequate distance from the actual minimum level of the salary in the national system in exam (in order to avoid high risk of corruption and lack of attractivity of the position) and the "general" character of the wage's reduction (aimed at neutralizing "punitive" reforms targeting "particular" categories of public officials or judges).

That said, the Reform at stake, by amending Art. 135 of the Law of Ukraine *On the Judiciary and the Status of Judges* (*Vidomosti of the Verkhovna Rada of Ukraine*, 2016, no. 31, p. 545 with subsequent changes), *de facto* reduces the salary for a judge of the Supreme Court of 27 per cent, while salaries of other categories of judges are preserved at the same level.

As properly stressed by the Venice Commission[91], it is therefore hardly deniable that such reduction is uniquely directed at the judges of the Supreme Court, thus entailing a particular measure affecting the remuneration level of a specific category of judges, which appears hard to interpret in terms other than a punitive intervention against the current judges of the Ukrainian Supreme Court.

6. *The withdrawal of the lustration system envisaged by the Draft Law: a "purge" neutralized at the last minute*

The envisaged amendment of Article 3 b) of the 2014 Law *On Government Cleansing*, originally contained in the Draft Law of the Reform, represented a real "purge" typical of «the legacy of totalitarian regime» that could «not be used to remove unwelcome officials of a previous government after a democratic change of government»[92].

It was indeed clear that such provision («[…] for a member of the HQCJ, as well for persons who in the period from 21 November 2013 till 19 May 2019, cumulatively for at least one year, held a position (positions) of a Head of the High Qualification Commission of Judges of Ukraine, a Head of the State Judicial Administration of Ukraine, and their deputies […]») embodied a form of ban *ad personas*, disconnected from any form of criminal, civil or disciplinary ascertained liability, as well as from any form of assessment of professional ineptitude, thus incompatible with the basic conventional principles.

As highlighted by the Office of the United Nations High Commissioner for Human Rights, «Vetting processes should, therefore, be based on assessments of individual conduct.

[90] Explanatory Note of the CM Recommendation (2010) 12, cited above, §§ 56-57.
[91] See the afore-cited Venice Commission Opinion, § 77.
[92] *Ibidem*, § 7.

Purges and other large-scale removals on the sole basis of group or party affiliation tend to cast the net too wide and to remove public employees of integrity who bear no individual responsibility for past abuses. At the same time, group removals may also be too narrow and overlook individuals who committed abuses but were not members of the group. Such broadly construed collective processes violate basic due process standards, are unlikely to achieve the intended reform goals, may remove employees whose expertise is needed in the post-conflict or post-authoritarian period, and may create a pool of discontented employees that might undermine the transition»[93].

The complete withdrawal of such a provision, *inter alia* deeply impacting on the execution of the *Volkov group* of cases, was therefore the only possible solution to follow in this regard by the national authorities.

7. *The averted abrogation of the "HCJ" right of producing consultative opinions on legislation*

With regard to the originally envisaged abrogation of the HCJ consultative powers, a preamble is necessary.

In *Volkov* (as well in *Sovtransavto Holding*, although in a different background), the Court made multiple references to the "principle of separation of powers" as «one of the most important values underpinning the effective functioning of democracies»[94].

Generally, in the field of public law, a distinction is made between mandatory and facultative consultative opinions (depending on whether their request is necessary or not so that the requesting authority can complete the administrative or legislative process), and between binding and non-binding consultative opinions (depending on whether their content must necessarily be taken into account by the requesting authority or not).

Given the above, since legislative power lies with the Parliament, on the one hand it can in principle be excluded that the opinions issued by the High Council for the Judiciary are binding in their content.

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[93] *Rule-of-Law Tools for Post-conflict States. Vetting: An Operational Framework* (HR/PUB/06/5, 2006), mentioned in *Polyakh and others v. Ukraine*, cited above, § 114. See also, in footnote no. 81, the concurring opinion of judge Pinto de Albuquerque, expressed in *Soro v. Estonia*, cited above, §§ 7-13; and ECtHR 24 April 2007, no. 38184/03, *Matyjek v. Poland*, § 62.

[94] See *Volkov*, cited above, §§ 103, 118 and 199: «103. […] The Court emphasises that the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in its case-law (see Stafford v. the United Kingdom [GC], no. 46295/99, § 78, ECHR 2002-IV). At the same time, neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction […] 199. […] the violations found in the case suggest that the system of judicial discipline in Ukraine has not been organised in a proper way, as it does not ensure sufficient separation of the judiciary from other branches of State power». See also ECtHR 25 July 2002, no. 48553/99, *Sovtransavto Holding v. Ukraine*, § «82: Having regard to interventions of the executive branch of the State in the court proceedings, the role played by the objections procedure in the proceedings in issue and to all the other aforementioned matters, the Court finds that the applicant company's right to have a fair hearing in public by an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention, construed in the light of the principles of the rule of law and legal certainty, was infringed».

On the other hand, the need for the Parliament to request a mandatory opinion to complete certain legislative procedures, above all in matters of judicial organization and regulation that may have an impact on the functioning of the proceedings, appears appropriate, for the purpose of loyal collaboration between branches of State powers[95].

However, as a minimum standard, it should be ensured that the HCJ as an institutional body, as well as any judge individually, even regardless of the regulatory provision of a mandatory opinion for certain laws, can freely exercise their right to comment or criticize legislative reform bills in adoption by the Lawmaker.

Given these premises, the current abandonment of the envisaged reform aimed at repealing the right to produce consultative opinions on legislative matters on the part of the Ukrainian High Council of Justice is certainly a further positive element to consider.

8. *Final remarks*

As analysed in this paper, the Reform of the Ukrainian judicial system presents lights and shadows, on the one hand proposing a greater relevance of the role of "judge members" and international experts within the self-governing bodies of the judiciary, on the other hand making several strides back in the field of disciplinary proceedings, of removal of the Supreme Court's judges and reduction of their salaries.

It cannot go unnoticed that the above-examined issues are in some respects similar to the ones recently raising from other countries like Poland[96], Hungary[97] and Romania[98], notably concerning disciplinary system, external (influence of the executive branch on appointments, promotions, and dismissal) and internal (excessive powers of court presidents) independence, freedom of expression and of assembly of judges.

Guarantee of irremovability, tenure until the mandatory retirement age, remuneration level, freedom of expression on matters of public interest, are all reflects of the independence of the judiciary and of the principle of separation of the branches of State powers.

In particular, independence of the judiciary, both external and internal, doesn't represent a value in itself neither a personal privilege of the single judge or of the judiciary as a whole.

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[95] In Italy, this right to render "mandatory" and "non-binding" consultative opinions is provided under Art. 10 of Law no. 195 of 1958 on the draft laws concerning the judiciary, the administration of justice and on any other subject in any case relevant to the aforementioned matters. Cyclically, Parliament casts doubts on this right, claiming full separation between the branches of State powers.

[96] See Joint Urgent Opinion No. 977/2019 of 16 January 2020, issued by the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe *on amendments to the law on the common courts, the law on the Supreme Court, and some other laws.*

[97] See Opinion No. 943/2018 of 19 March 2019 *on the law on administrative courts and the law on the entry into force of the law on administrative courts and certain transitional rules*, adopted by the Venice Commission at its 118th Plenary Session.

[98] See Opinion No. 924/2018 of 20 October 2018 *on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy*, adopted by the Venice Commission at its 116th Plenary Session.

Paradoxically, and contrary to widespread public opinion, it is the lowering of the level of independence of the judiciary that generally gives rise to phenomena of privileges and collusive agreements between the legislator and parts (or even the whole) of the judiciary, to the detriment of the rest of society, whose components are degraded to subjects rather than citizens.

It is crucial that public opinion becomes aware of the fact that the real sense and function of the independence lie in the guarantee of the individual's right to have its freedoms and rights protected and secured in the context of a fair trial, adjudicated by an independent judge, sheltered from any undue pressure from other branches of State powers or from within the judiciary[99].

International tenets and the ECtHR case-law itself recognize the close link between independence of the judiciary and Art. 6 of the Convention, in the perspective of the safeguard of the citizens rather than judges.

Notably, alongside the consolidated attention to the concept of "external" independence, the notion of "internal" independence is becoming more relevant and discussed beyond the traditional borders of the former communist countries, becoming of interest for all the established democracies party of the Council of Europe[100].

These, and not others, are the real reasons why domestic and international institutions shall have to constantly and carefully monitor the maintenance of adequate standards of independence, both external and internal, of the judiciary, true bulwark of the rule of law and, ultimately, of democracy itself.

[99] That is to say «[…] free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division of the court»: see, *ex plurimis*, ECtHR 22 December 2009, no. 24810/06, *Parlov-Tkalčić v. Croatia*, § 86.

[100] See J. SILLEN, *The concept of 'internal judicial independence' in the case law of the European Court of Human Rights*, cited above, p. 108 and 123 ss.